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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:	)	
	)	
Application of BellSouth Corporation,	)	
BellSouth Telecommunications, Inc.	)	CC Docket No. 97-231
and BellSouth Long Distance, Inc.	)	
Pursuant to Section 271 of the	)	
Telecommunications Act of 1996 to Provide	)	
In-Region, InterLATA Services in Louisiana	)	

COMMENTS OF COX COMMUNICATIONS, INC.

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SUMMARY

BellSouth's application to provide in-region, interLATA services in Louisiana cannot be granted. Even if the Commission were to look only at the problems that Cox has experienced with BellSouth in Louisiana, those problems are sufficient to justify a rejection of BellSouth's Section 271 application.

First, BellSouth has broadly repudiated its obligation to provide reciprocal compensation to Internet Service Providers ("ISPs"), in contravention of established FCC policy and voluntary interconnection contracts into which BellSouth previously entered. *Second,* BellSouth has failed to meet other essential checklist requirements, such that grant of its Section 271 application is not in the public interest at this time. And *third,* BellSouth has obstructed Cox's efforts to enter the local exchange market in Louisiana. These delaying tactics also are relevant to the FCC's public interest determination.

Each of these flaws is by itself sufficient to require denial of BellSouth's application. Although Cox does not comment on certain other requirements under Section 271, this does not indicate that Cox believes that BellSouth has satisfied those requirements. Rather, Cox is providing the FCC with information on areas of significant concern to Cox and where Cox has specific information.

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Cox Communications Inc. ("Cox Communications"), the parent company of Cox Louisiana Telcom II, L.L.C. and Cox Fibernet Louisiana, Inc. (altogether referred to as "Cox"), by its attorneys, hereby submits these comments in the above-referenced proceeding.[1/] On November 6, 1997, BellSouth filed an application for authorization to provide in-region, interLATA services in Louisiana pursuant to Section 271(c)(1)(A) of the Telecommunications Act (the "Act"), commonly referred to as "Track A." As shown below, BellSouth's Section 271 application cannot be granted in Louisiana based on BellSouth's behavior and the degree of openess BellSouth has demonstrated exists in the local exchange market in Louisiana.

1/ *See* Comments Requested on Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Louisiana, *Public Notice*, CC Dkt. No. 97-231, FCC 97-2330 (rel. Nov.6, 1997). For convenience of reference, Cox will use the term "BellSouth" to refer to the applicants collectively.

I. INTRODUCTION

Through subsidiaries, Cox Communications serves over 271,000 cable subscribers within the state of Louisiana. As the Commission is aware, Cox is spending billions of dollars upgrading its cable television facilities in its large clusters, such as Louisiana, to offer the promise of full facilities-based local residential and business competition to landline telephony monopolies. Cox has already launched competitive telecommunications services in Orange County, California, and in Hampton Roads, Virginia and plans to launch competitive telecommunications services in Omaha, Nebraska later this year. Thus, Cox has a vital interest in ensuring that BellSouth, as an incumbent LEC, fulfills its obligations under Section 271 in Louisiana. Cox's subsidiary, Cox Louisiana Telcom II, L.L.C. ("Cox Telcom") very recently was certified as a CLEC in Louisiana and, as BellSouth recognizes in its brief, Cox, through its Louisiana Fibernet subsidiary, already "provides access service, long-distance service (with its partner Frontier Corporation), Internet access and private line[s]" in Louisiana.[2/] Cox plans to provide facilities-based, residential and business competition to BellSouth in Cox cable markets in Louisiana.[3/] Cox's ability to compete, however, depends greatly on its ability to obtain fair terms and conditions of interconnection and reasonable operational support relationships with BellSouth in accordance with Section 271(c)(2)(B). These issues also are central to the FCC's assessment of BellSouth's current application.

2/ BellSouth Brief at 19.

3/ *Id.*, at 19. *See also* Application of Cox Telcom For a Certificate of Public Convenience and Necessity to Provide Local Exchange and InterLATA Telecommunications Service, at 6, 11-13.

The principle expressed in Section 271 is that a BOC's entry into the long distance market would be anticompetitive unless, as measured by compliance with certain specific requirements, the BOC no longer possesses the tools to maintain its market power in the local exchange market. The ultimate burden of demonstrating that the BOC has taken real, significant and irreversible steps to open its local market to competition remains at all times with the Section 271 applicant. Therefore, BellSouth must show that the various requirements for local entry contemplated by the Act, *e.g.* non-discriminatory access to interconnection, incrementally cost-based reciprocal transport and termination, availability of unbundled network elements and fully functional operational support systems, are broadly available. Regardless of whether the application has been filed under Track A or Track B of Section 271(c)(1), BellSouth must show that it fully complies with each element of the 14-point competitive checklist. As shown below, BellSouth has not done so.

II. BELLSOUTH'S CURRENT POLICY ON TREATMENT OF INFORMATION SERVICE PROVIDER TRAFFIC VIOLATES ITS OBLIGATION TO PROVIDE RECIPROCAL COMPENSATION

A. BellSouth Flatly Refuses to Pay Compensation for Traffic Terminated by CLECs to Information Service Providers.

As it boldly states in its brief, BellSouth refuses to pay reciprocal local interconnection charges for traffic terminated to enhanced service providers operating as ISPs because, BellSouth argues, this traffic is jurisdictionally interstate and thus subject to interstate access charges.[4/] This action demonstrates the lack of good faith on the part of BellSouth when

4/ BellSouth Brief at 64.

negotiating interconnection agreements with requesting carriers and shows that BellSouth continues to abuse its power as the dominant ILEC in Louisiana.[5/] BellSouth's declaration that it will no longer honor its previous interconnection agreements is an obvious reaction to its belated discovery that CLECs are targeting Internet service providers as customers.[6/] The CLECs have, among other things, designed business plans that assume that they will be compensated for all of the local traffic they terminate. By unilaterally redefining local ISP traffic as interstate access traffic, BellSouth is changing the rules in midstream. Perhaps more seriously, not obtaining compensation for certain types of calls will, at least, slow competitors' entry into the local exchange service market and may result in some potential competitors choosing not to enter at all because of the financial effects of not being compensated. BellSouth's attempts to deny compensation for calls to enhanced service providers in Louisiana and in other states are particularly disturbing because those attempts are consistent with the historic ILEC pattern of

5/ BellSouth has negotiated interconnection agreements that included reciprocal compensation for ISP traffic. Intermedia, for example, reported to the FCC that under its agreement in South Carolina, BellSouth was paying reciprocal compensation for local calls to ISPs until August 12, 1997. On that date, however, BellSouth unilaterally stopped paying for those calls, in violation of its interconnection agreement with Intermedia. *See* Comments of Intermedia Communications Inc. in Opposition to BellSouth's request for In-Region, InterLATA Relief in South Carolina, Docket No. CC-97-208 at 40-42 (relevant excerpts are attached hereto as Appendix 1).

6/ Even without considering the impact of reciprocal compensation, Internet service providers are attractive customers for a variety of reasons. Internet service providers tend to be high-growth companies that need advanced services that CLECs are well positioned to provide. Also, Internet service providers tend to be more sophisticated than most customers about their telecommunications needs, which means that they are more likely to recognize the benefits of obtaining high bandwidth, high quality service from a CLEC.

attempting to leverage market power to avoid paying compensation to other co-carriers, including CMRS providers.[7]

B. BellSouth's Position Is Contrary to the Requirements of Sections 251(b)(5) and 271(c)(2)(B) (xiii) and Longstanding FCC Policy.

BellSouth's refusal to pay compensation to enhanced service providers constitutes a violation of item (xiii) of the checklist requirements and is sufficient in itself to justify the rejection of its Section 271 application. BellSouth's position is contrary to the Congressional intent to bring the benefits of competition "to all Americans" and not just to those segments of community designated by ILECs.[8] It is also contrary to longstanding FCC rules and policy, which require that information service providers be treated as if they are regular business users.[9] The FCC as recently as late last year confirmed the vitality of this longstanding policy.[10]

7/ *See* Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd. 15499-15999 (1996) (the *"Local Competition Order"*) at 16041, 16044.

8/ *See* S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 1 (1996) (defining the purposes of the 1996 Act).

9/ *See Local Competition Order,* at 16016. The Commission stated: "we find that LECs have a duty to establish reciprocal compensation arrangements with respect to local traffic originated by or terminating to any telecommunications carriers."

10/ *Notice of Proposed Rulemaking, Third Report and Order, and Notice of Inquiry,* Access Charge Reform, CC Dkt. Nos. 96-262, 94-1, 91-213 and 96-263, FCC 96-488 (rel. Dec. 24, 1996). *Id.* at 288: "we tentatively conclude that the current ISP pricing structure should not be changed so long as the existing access charge system remains in place. The mere fact that providers of information service use incumbent LEC networks to receive calls from their customers does not mean that such providers should be subject to an interstate regulatory system designed for circuit-switched interexchange voice telephony."

In all meaningful respects, especially when including the costs to the terminating carrier, a local call to an enhanced service provider is the same as any other local call. Cox previously has shown this position is consistent with the nature of traffic to ISPs.[11] Many state commissions that have reviewed this issue agree that calls to ISPs constitute local traffic subject to reciprocal compensation.[12] This application is an opportunity for the FCC to affirm that ILECs should not be permitted to ignore existing contracts and longstanding FCC policies that specify what types of traffic are entitled to reciprocal compensation as local traffic. At the very least, the FCC should acknowledge the competitive implications of compensation of ISP local traffic and implement the Congressional intent to impose a reciprocal compensation obligation on all calls that originate and terminate within the local calling area, regardless of who the customers originating and terminating the calls may be and regardless of the service the customer purchases.

11/ *See* "Pleading Cycle Established for Comments on Request by ALTS for Clarification of the Commission's Rules Regarding Reciprocal Compensation for Information Service Provider Traffic," *Public Notice*, File No. CCB/CPD 97-30, DA 97-1399, rel. July 2, 1997, Cox Comments at 9 and Reply Comments at 6. Because Internet traffic, unlike interstate long distance traffic, leaves the public switched telephone network at the Internet service provider's premises, it is much more logical to require compensation to be paid in the same manner and at the same rate as compensation for local traffic than to subject it to traditional access charges.

12/ *See, e.g.*, Petition of Cox Virginia Telecom, Inc. For Enforcement of Interconnection Agreement with Bell Atlantic-Virginia, Inc. and Arbitration Award for Reciprocal Compensation for the Termination of Local Calls to Internet Service Providers, Commonwealth of Virginia, State Corporation Commission, Case No. PUC970069, *Final Order* dated October 24, 1997; Ameritech Illinois Agreement Dated June 26, 1996 Between WinStar Wireless of Illinois, Inc. and Ameritech Illinois, Illinois Commerce Commission, 96-NA-003, *Order* dated October 9, 1997); State of New York Public Service Commission, *Order Denying Petition and Instituting Proceeding,* dated July 17, 1997.

C. BellSouth's Approach to this Issue Also Demonstrates that It Does Not Intend to Cooperate With Its Local Exchange Competitors.

BellSouth's repudiation of its interconnection agreements that provide for reciprocal compensation *after* the execution of these agreements in Louisiana parallels BellSouth's behavior in South Carolina. Before BellSouth unilaterally announced its decision to stop paying reciprocal compensation for ISP traffic, BellSouth did not seek to negotiate that issue.[13/] Neither did it seek regulatory guidance before taking that position. There is, moreover, no basis in Section 251(b), in any other provision of the 1996 Act or in the FCC's rules for a carrier to unilaterally declare that certain traffic qualifies or does not qualifies as local and, as such, will or will not be compensated. It is reasonable to think that, in refusing to pay compensation for ISP traffic, BellSouth was implementing a strategy to gain substantial commercial advantage over CLECs.

Denying reciprocal compensation for terminating certain types of traffic does not merely affect competitors; it also has an adverse effect on customers. It reduces incentives for new providers to enter the market because they lose the opportunity to compete for the business of potential major customers such as Internet service providers. When reciprocal compensation is available for all types of calls, there are incentives for all carriers to compete for all types of customers. When compensation is not available for traffic terminated to certain types of customers, such as Internet service providers, and is available for traffic terminated to other customers, then it is financially more difficult to serve the customers for whom compensation is

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13/ See e.g. Appendix 1.

not available. BellSouth's refusal to pay reciprocal compensation thus is an attempt to attain a *de facto* monopoly on the markets for such services.

III. THE RECORD DOES NOT PERMIT THE FCC TO CONCLUDE THAT BELLSOUTH HAS MET ITS CHECKLIST OBLIGATIONS

To meet the requirements of Section 271(c)(2), BellSouth must fulfill each of the 14 elements of the competitive checklist. BellSouth fails to do so in several significant respects. It has not demonstrated the availability of non-discriminatory access to 911 and number portability, items that are critical to public safety and to the development of local competition. Most important, BellSouth admits that it is choosing not to offer services in compliance with the requirements outlined by the FCC in the *Michigan Order.*[14/]

A. BellSouth Admits that It Does Not Meet Certain Requirements and Its Application Is *Per Se* Defective.

A BOC is expected to present a *prima facie* case that all Section 271 requirements have been satisfied. A BOC must support its application with real evidence demonstrating real compliance. However, at the outset, BellSouth concedes that there are several areas in which it disagrees with the FCC's interpretations of the checklist requirements as discussed in the *Michigan Order,* particularly regarding pricing and certain OSS performance measurements and standards. BellSouth urges the FCC to review its position on the disputed issues and to "look

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14/ Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan, *Memorandum Opinion and Order*, CC Docket No. 97-137, FCC No. 97-298 (rel. August 19, 1997) (*"Michigan Order"*). BellSouth Brief at 24.

beyond these narrow disagreements [about the meaning of the legislation] to the broad effort BellSouth is making to accommodate competitive [entry by CLECs in Louisiana]."[15]

The biggest problem with BellSouth's argument, however, is that the areas in which BellSouth has chosen not to comply are not narrow. To the contrary, OSS and pricing are crucial to the future of local competition in Louisiana. A "good-faith commitment" to foster competition in the local market is not the standard under which a BOC's application to provide interLATA services is to be assessed. Instead, under the relevant legal standard, the BOC must meet *each* of the checklist requirements. By refusing to accept its legal obligations, BellSouth is effectively delaying competitive local entry in Louisiana. This is sufficient grounds to reject its Section 271 application.

B. While the Louisiana PSC Held a Lengthy Section 271 Proceeding, It Did Not Address Certain Issues Relating to BellSouth's Handling of 911 And Number Portability.

Section 271(d)(2)(B) gives state commissions a formal consultative role in evaluating BOC Section 271 applications. As part of its broader proceedings evaluating BellSouth's Section 271 qualifications, the Louisiana PSC ordered a technical demonstration of OSS functionalities by BellSouth on August 13, 1997. In preparation for this demonstration and pursuant to the Louisiana PSC's Order of July 28, 1997, Cox properly submitted on August 4, 1997 a list of potential complications Cox had experienced with respect to BellSouth's Operational Support

15/ BellSouth Brief at 24-25.

Systems ("OSS").[16] It was Cox's understanding that all those outstanding issues would be addressed at the BellSouth demonstration or in BellSouth's written response prior to the demonstration.[17] A number of these issues related to how BellSouth intended to provide 911 access and number portability.

BellSouth filed its response to the filings of Cox and others with the Louisiana PSC on August 11, 1997. The answers to the 911 and number portability issues Cox and other CLECs raised were not in all cases satisfactory or responsive. Moreover, contrary to what BellSouth now claims in its Brief,[18] at its technical demonstration BellSouth chose not to address these issues. Cox was not given an opportunity to present its views at the conference.[19] At the invitation of a Louisiana PSC Commissioner, Cox reiterated those concerns in a filing following

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16/ A copy of the List of Potential Complications filed by Cox on August 4, 1997 is attached as Appendix 2.

17/ The morning of the technical presentation, it was announced that the entire presentation would be included on the record.

18/ *See* BellSouth Brief at 2.

19/ BellSouth Brief at 2. BellSouth's allegation that "all interested parties had a chance to present their views and examine BellSouth's evidence, although many chose to waive that opportunity" is further contradicted by the comments of Commissioner Field at the Louisiana PSC open session of August 20, 1997. *See* Louisiana Public Service Commission, *Id.* at Proposed Business and Executive Session of August 20, 1997 at 39, 41. Noting that the technical demonstration had not been held according to his recommendation of July 28, 1997, Commissioner Field said: "[...] and I understand there wasn't cross examination afforded the parties and not all parties were allowed to make a presentation, so I think that needs to be considered by this Commission [...]." Another Commissioner confirmed the absence of cross-examination by stating: "Once we saw everything that needed [during the technical demonstration], actually in our minds were satisfied, then the conference was ended and we told people that they could submit other things in writing." A copy of the relevant transcript excerpts is attached as Appendix 3.

the technical demonstration.[20] BellSouth, however, never addressed these critical operational issues in any filing, nor were they discussed in the Louisiana PSC's order.[21]

Although the Louisiana PSC concluded, based on its proceeding, that BellSouth had met its checklist requirements, this evidence shows that such a conclusion was not possible in light of the record that was before the PSC.[22] Moreover, because BellSouth did not respond to Cox's concerns regarding 911 and number portability in the course of the Louisiana PSC proceeding, it is also impossible for the FCC to conclude that BellSouth provides nondiscriminatory access to 911 and number portability in Louisiana. The FCC cannot assume that these requirements have been satisfied and may not grant the application until BellSouth, which bears the burden of proof, actually has demonstrated that it complies with its obligations under Section 271(c)(2).

It is particularly important for the FCC to require proof of full compliance with the number portability and 911 requirements of the checklist. Portability and 911 provisioning are

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20/ A copy of this filing is attached as Appendix 4.

21/ Consideration and Review of BellSouth Telecommunications, Inc.'s Preapplication Compliance with Section 271 of the Telecommunications Act of 1996, Order U-22252-A, Docket U-22252 (LPSC rel. Sept. 5, 1997) (*"Compliance Order"*).

22/ Indeed, during the Louisiana PSC's open session of August 20, 1997, Commissioner Field clearly identified the necessary improvements that should have been required from BellSouth with respect to the OSS functions before the granting of its application. Louisiana PSC's Open Session of August 20, 1997 at 36. Commissioner Field suggested granting Bellsouth a sixty day grace period to improve its OSS "particularly in the area of capacity, LENS' inability to reserve more than six lines, the joint ordering capacity of LENS and EDI exceeding BellSouth's capacity to generate orders and the minimum capacity of BellSouth's repair and maintenance interface known as TAFI." A copy of the relevant transcript excerpt is attached as Appendix 5.

critical to the development of local telephone competition and to public safety.[23] In the *Michigan Order,* the FCC warned that it would take very seriously any allegation that a BOC is failing to meet its obligation of providing number portability and would carefully examine the status of a BOC's implementation of a long-term portability method.[24] BellSouth, however, has not provided adequate supporting documentation, as required under the *Michigan Order,* that it has undertaken reasonable and timely steps to fulfill checklist item (xi).

BellSouth also does not demonstrate that it meets the standard of access to 911 services set forth in the *Michigan Order.*[25] BellSouth's filing with the Louisiana PSC of August 11, 1997 does not show that BellSouth maintains the 911 database entries for CLECs' end users with the same accuracy and reliability that it maintains the database entries for its own customers. As confirmed during the technical demonstration, BellSouth, like Ameritech at the time of the *Michigan Order*, does not provide CLECs with a mechanized electronic transfer system.[26] Moreover, there is no evidence that BellSouth performs error correction for CLECs on a nondiscriminatory basis. Because BellSouth does not provide access to its 911 database at parity, it has failed to satisfy item (vii) of the checklist. Until it satisfies both of these checklist requirements, its application for Louisiana cannot be granted.

23/ *First Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd 8352, 8367 (1996) ("*Number Portability Order*").

24/ *Michigan Order* at ¶ 341-342.

25/ *Michigan Order* at ¶ 265-270.

26/ *See* BellSouth's filing before the Louisiana PSC on August 11, 1997, Docket No. U-22252, at 3.

IV. BELLSOUTH HAS OBSTRUCTED COX'S EFFORTS TO ENTER THE LOCAL EXCHANGE MARKET IN LOUISIANA

On July 17, 1997, Cox Telcom filed its application for a certificate of public convenience and necessity with the Louisiana Public Service Commission ("PSC") to provide local exchange and interLATA telecommunications services to residential and business customers. However, because BellSouth successfully set up a barrier to facilities-based competition and interposed a purely procedural, meritless objection, the application was not filed until July 1997 and was not granted until late October 1997. Once the procedural objection was disposed of, the Louisiana PSC had no trouble finding that Cox was entitled to a CLEC certificate. BellSouth's tactics militate against grant of this application at this time.

As part of its CLEC application, Cox sought an exemption from the unbundling requirements set forth in the Louisiana PSC Regulations for Competition in the Local Telecommunications Market.[27/] Notice that the application had been filed was published twice: first on July 25, 1997 and again on August 22, 1997. Neither BellSouth nor any other party filed an intervention or opposition following the first publication. However, on September 12, the last day for filing an intervention following the second publication, BellSouth objected to Cox's application, solely on the ground that any waiver of the PSC's new entrant unbundling requirements granted to Cox would represent a "collateral" attack on the PSC's rules.

27/ *See* Application of Cox Telcom For a Certificate of Public Convenience and Necessity to Provide Local Exchange and InterLATA Telecommunications Service, at 14. Section 301 K.2, 901 U., 1001 A. and 1101 C. of the Louisiana Regulations For Competition in the Local Telecommunications Market. Cox argued that for both legal and policy reasons, the PSC should not enforce a uniform network unbundling requirement against Cox as a new entrant.

Even considering Cox's exemption request, the grant of the application would have been routine absent the procedural objection raised by BellSouth.[28/] Indeed, as it admitted in its Memorandum in Opposition to Motion for Summary Judgment, BellSouth had no objection to Cox being certified as a CLEC. BellSouth even had no substantive objection to the relief being requested by Cox. BellSouth's objection to Cox' s request was primarily based "on the manner in which the exemption has been sought rather than on the merits of the request."[29/] BellSouth viewed the request for exemption as an indirect attack on the new entrant unbundling rules established by the Louisiana PSC in its Regulations for Competition.[30/]

In filing its opposition to Cox's request for summary judgment, BellSouth deliberately ignored the provisions of the 1996 Act, the FCC's rules and the Eighth Circuit's conclusions with respect to the application of unbundling requirements to non-incumbent local exchange carriers. As Cox observed in its CLEC certification filings, applying unbundling requirements to Cox prior to a determination by the FCC that Cox merited the same regulatory treatment as an

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28/ BellSouth was the only party that intervened in Cox's certification proceeding.

29/ *See* BellSouth's Memorandum in Opposition to Motion for Summary Judgment, CC Docket No. U-22624 at 2, filed on October 16, 1997 (attached hereto in Appendix 6).

30/ BellSouth, however, did not make any suggestion as to the appropriate manner in which the exemption should have been presented to the Louisiana PSC. Nonetheless, it implied that this clearly improper requirement, that new entrants unbundle their network, should remain in force and specifically complained that "any TSP seeking to do business in Louisiana could make the same arguments as Cox to justify exemption from the unbundling requirements". If the PSC were to grant Cox's request, BellSouth argued, it would have no basis for denying the same relief to every other CLEC operating in Louisiana. BellSouth alternatively requested that, if the PSC was inclined to grant the exemption, Cox be granted a "temporary exemption" while further comments from interested parties would be invited. See BellSouth Memorandum in Opposition to Motion for Summary Judgment filed in Docket No. U-22624, on October 16, 1997 at 2-3.

incumbent LEC would have been contrary to the asymmetry reflected in the provisions of Section 251 of the 1996 Act and the FCC's rules preventing states from applying ILEC regulatory obligations to CLECs providers.[31/] It is obvious that Cox's position as a new entrant in the Louisiana telephone market is unlike the decades-long monopoly enjoyed by BellSouth and, as a result, that Cox does not meet the description of a comparable ILEC within the meaning of Section 251(h)(2).

Further, the classification of a carrier as an ILEC for the purpose of applying network unbundling requirements is within the sole jurisdiction of the FCC. This exclusive jurisdiction of the FCC has been confirmed in the FCC's *Local Competition Order*[32/] and by the Eighth Circuit.[33/] BellSouth had earlier requested that the Louisiana PSC apply uniform unbundling rules the state commission had established at the state level before the FCC released its *Local Competition Order* and before the release of the Eighth Circuit's opinion confirming the FCC's exclusive jurisdiction over such matters.[34/] Indeed, BellSouth's support for the unbundling requirements undoubtedly was an anticipatory effort to impede competition at the local level in

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31/ For example, Section 251(h)(2) read in conjunction with Section 4 of the 1996 Act gives the FCC exclusive jurisdiction to provide, by rule, for the treatment of a local exchange carrier as an ILEC, but only if (i) the carrier in question occupies a position in the market for telephone exchange service that is comparable to the position of an ILEC; (ii) such carrier has substantially replaced an ILEC; and (iii) such treatment is consistent with the public interest. Act of February 8, 1996, Pub. L. No. 104-104, 1996 U.S.C.C.A.N. (110 Stat.) 65-66. Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, *First Report and Order*, 11 FCC Rcd. 15499-15518 (1996) (the *"Local Competition Order"*).

32/ *See* Id., 11 FCC Rcd. at 15499-15518 (1996).

33/ Opinion, *Iowa Utilities Board et al. v. FCC* (8th Cir. 1997), at 103, fn. 10.

34/ Under Section 253(d) of the Act, state regulations that are inconsistent or in violation of the provisions of the Act are preempted.

Louisiana.[35] However, by the time it filed its opposition to Cox's application on September 12, however, BellSouth knew that it was contrary to the 1996 Act to press the PSC to enforce a rule that was beyond the PSC's authority to adopt. This nevertheless did not dissuade BellSouth from opposing Cox's application on this meritless procedural ground and attempting to reinforce the barriers it previously had urged on the Louisiana PSC.[36]

In this context, the only reasonable conclusion is that BellSouth's sole purpose in filing a notice of intervention at the last minute, requesting a full hearing and opposing Cox's efforts to have the issues raised by BellSouth dealt with promptly by summary judgment, was to delay Cox's entry into the local exchange telephone market. There can be no other explanation: BellSouth did not even attempt to provide any substantive arguments in favor of retaining the Louisiana unbundling requirement. Moreover, BellSouth actually succeeded in delaying the approval of Cox's application by the Louisiana PSC until October 22, 1997, at least sixty days beyond the normal processing time for a typical unopposed CLEC application in Louisiana.

BellSouth's initial barrier building and its more recent attempts to frustrate Cox's application are relevant to the FCC's determination with respect to the availability of Track A or

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35/ *See* Comments of BellSouth filed in Docket No. U-20883 Louisiana Public Service Commission, on November 21, 1995 at 16.

36/ BellSouth was well aware that the effect of its intervention filing was to knock Cox's application out of streamlined processing and into an open-ended administrative hearing process. In its opposition, BellSouth again complained of Cox's desire to quickly enter the marketplace: "Unwilling to participate in the adjucatory process, Cox seeks to bypass that process and have the Commission grant, *in summary fashion*, its request without any record evidence [*i.e.* a hearing, after discovery and a procedural schedule] and without any *formal* participation by either an Administrative Law Judge or the Commission Staff." BellSouth Memorandum in Opposition to Motion for Summary Judgement at 2.

Track B and to the public interest analysis. Together, the PSC's unbundling requirement and the opposition substantially delayed Cox's entry into the local exchange market.[37/] Delay was important to BellSouth because, as is the case in other states, Cox represents the best potential facilities-based competitor for residential (and business) service in parts of Louisiana. In fact, Cox already has launched telephone exchange services in its Orange County, California cable cluster and in Hampton Roads, Virginia.[38/] By the end of the year, Cox also plans to begin offering local telephone services in Omaha, Nebraska, where it would be the largest competitor to U S West.[39/] In Louisiana, however, as a result of the delay caused by the unbundling requirement and in the processing of Cox's application, Cox Telcom was not certificated during the pendency of the proceeding before the PSC on BellSouth's Section 271 application.[40/] The unbundling requirement urged on the PSC and defended by BellSouth in its opposition created substantial regulatory uncertainty with respect to Cox's entry into the Louisiana market and, in addition, created doubt about the timing of Cox's entry. This also necessarily delayed Cox's request for interconnection negotiations.

So long as Cox's entry was delayed, BellSouth could continue to make claims before the Louisiana PSC that there was no real prospect for facilities-based residential competition

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37/ Cox Telcom was prepared to file its CLEC application months earlier but could not do so because of the uncertainty created by the uniform unbundling requirement that BellSouth had urged the Louisiana PSC to adopt.

38/ Press Releases of September 11, 1997 and October 23, 1997.

39/ Press Release, Sunday Sunrise Edition of July 13, 1997.

40/ BellSouth's objection delayed action on Cox's application until October 22, the same day that the Louisiana PSC finalized its Section 271 application recommendation.

in Louisiana. While BellSouth purportedly has filed this application under Track A, in practice it can be considered only under Track B if at all.[41] The grant of Cox's certification application, however, greatly complicates BellSouth's already weak Track B argument.[42] Specificially, grant of Cox Telcom's application eliminates BellSouth's ability to claim that there will be no facilities-based residential competition in Louisiana. In fact, just as in other markets, Cox's service will be facilities-based from the start and, given the location of Cox's existing facilities, residential service is an integral part of its business plan.

For these reasons, BellSouth's delaying tactics look suspiciously like an effort to bolster its case for Track B treatment, even as BellSouth attempts to avail itself of both Track A and Track B.[43] Track B is not an option for BellSouth in any event. Even assuming that Cox's application, which was filed more than three months before BellSouth

41/ While BellSouth argues that the presence of PCS providers satisfies Track A, there are several reasons why this is not the case. First, only competitors that provide services that fall within the definition of "telephone exchange service" under Section 3(47)(A) can qualify a BOC under Track A, and the Commission already has determined that CMRS providers do not fall within that provision. *See* 47 U.S.C. § 271(c)(1)(A) (requiring provision of "access and interconnection" to "competing providers of telephone exchange service (as defined in Section 3(47)(A) but excluding exchange access)"); Local Competition Order, 11 FCC Rcd 15499-500 (the *"Local Competition Order"*) (holding that CMRS falls within Section 3(47)(B), but not Section 3(47)(A)). Moreover, the Commission should be wary of assertions that current PCS offerings provide residential competition. Indeed, there is no evidence that PCS yet replaces existing residential service. PCS is not currently used in the same way as traditional residential service. Most pricing and other aspects of PCS show that, at least for now, it is positioned to compete primarily with cellular, not landline, service.

42/ The existence of other potentially facilities-based carriers in Louisiana, such as ACSI, American MetroComm, ITC DeltaCom and KMC Telecom, is further evidence that Track B is not available.

43/ *See* BellSouth Brief at 21. BellSouth has made a similar effort in its South Carolina application. Of course, Track A and Track B are mutually exclusive.

sought Section 271 authority from the FCC, would not be relevant to the Track B inquiry, several other carriers have expressed their intent to provide facilities-based competition, have negotiated interconnection agreements with BellSouth and were in the process of becoming operational at the time of the BellSouth application.[44/] These facts alone are sufficient to prevent BellSouth from invoking the procedures of Track B to obtain interLATA relief in Louisiana. This conclusion is only bolstered by Cox's Louisiana certification and its consistent efforts to enter local telephone markets where it has cable clusters, in particular in Louisiana, even without considering the efforts of other parties,

Finally, BellSouth's opposition to Cox's application on an unfounded procedural basis belies BellSouth's claim of welcoming competition in the Louisiana local telephone market. The gratuitous delay caused directly by BellSouth violates the principles of Section 251, under which BOCs are required to take reasonable steps to open the local exchange market.[45/] Such behavior should be highly relevant to the FCC's public interest analysis and weigh heavily against grant of BellSouth's Section 271 authorization at this time.

44/ *See* BellSouth Brief at 17-20; *see also* Joint Post-Hearing Brief of Louisiana Cable Telecommunications Association and Cox Fibernet Louisiana, Inc., Docket No. U-22252, at 5.

45/ *Oklahoma Order* at ¶ 44.

V. CONCLUSION

As shown above, BellSouth has not yet met Section 271 requirements in Louisiana and, therefore, the FCC cannot grant BellSouth's application.

Respectfully submitted,

COX COMMUNICATIONS, INC.

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November 25, 1997

CERTIFICATE OF SERVICE

I, Cornelia R. DeBose, a secretary with the law firm of Dow, Lohnes & Albertson, hereby certify that a true and correct copy of the foregoing ***COMMENTS OF COX COMMUNICATIONS, INC.*** was served this 25th day of November, 1997 via United States first-class mail, postage prepaid, upon the following:

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